91-636

No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FORT GRATIOT SANITARY LANDFILL, INC.,

Petitioner,

—v.—

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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October 12, 1991

QUESTION PRESENTED

Does a state statute which prohibits the disposal within a county in the state of any solid waste which has been generated outside the county "discriminate against interstate commerce" within the meaning of this Court's decisions in *Maine v. Taylor*, 477 U.S. 131, 138 (1986), and *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978), with the result that the state must sustain the burden of demonstrating that such statute serves a legitimate local purpose which could not be served as well by available nondiscriminatory means?

PARTIES TO THE PROCEEDING

In addition to the petitioner* and respondent listed in the caption, the following are also respondents in this action: David Hales, Director of Michigan Department of Natural Resources; St. Clair County Health Department; John B. Parsons, Director of St. Clair County Health Department; St. Clair County Metropolitan Planning Commission, and Gordon Ruttan, Director; St. Clair County Solid Waste Planning Committee and Peg Clute, Chairperson.

* Pursuant to Rule 29.1 of this Court, petitioner states as follows: A controlling interest in petitioner, Fort Gratiot Sanitary Landfill, Inc., is owned by FGSLI Investment Corporation. A controlling interest in FGSLI Investment Corporation is owned by Trinity Capital Corporation. Trinity Capital Corporation is wholly owned by Trinity Holdings Corporation, a controlling interest in which is owned by Century Holdings (Cyprus) Limited, which is wholly owned by Century Holdings Ltd. Petitioner, Fort Gratiot Sanitary Landfill, Inc. has no subsidiaries.

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Petitioner, Fort Gratiot Sanitary Landfill, Inc.[1] ("Petitioner"), respectfully prays that a Writ of *Certiorari* issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit which was entered in this civil action on May 1, 1991.

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[1] This action was originally commenced by Petitioner *sub nom* "Bill Kettlewell Excavating, Inc."; the name of Petitioner was changed by an amendment to its certificate of incorporation which was filed with the Secretary of State of the State of Michigan on August 2, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (1a)[2] affirming the decision of the United States District Court for the Eastern District of Michigan is reported at 931 F. 2d 413 (6th Cir. 1991). The order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's Petition for Rehearing with Suggestion for Rehearing *En Banc* (22a) is reported at 1991 U.S. App. Lexis 17593, No. 90-1361 (6th Cir. 1991). The memorandum opinion and order of the United States District Court for the Eastern District of Michigan (12a) is reported at 732 F. Supp. 761 (E.D. Mich. 1990).

JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit was entered on May 1, 1991; the order of the Court of Appeals for the Sixth Circuit denying Petitioner's Petition for Rehearing with Suggestion for Rehearing *En Banc* was entered on July 16, 1991. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8 of the Constitution of the United States provides in pertinent part as follows:

> The Congress shall have Power . . . To Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ..

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[2] Citations herein to material printed in the Appendices appear as "_____a".

Section 13a of the Michigan Sanitary Waste Management Act, Mich. Comp. Laws Ann. § 299.413a (1991 Supp.), provides in pertinent part as follows:

> A person shall not accept for disposal solid waste . . . that is not generated in the county in which the disposal area is located unless the acceptance of solid waste . . . that is not generated in the county is explicitly authorized in the approved county solid waste management plan.

Section 30(2) of the Michigan Sanitary Waste Management Act, Mich. Comp. Laws Ann. § 299.430(2) (1991 Supp.), provides in pertinent part as follows:

> In order for a disposal area to serve the disposal needs of another county, state or country, the service . . . must be explicitly authorized in the approved solid waste management plan of the receiving county.

STATEMENT OF THE CASE

Sections 13a and 30(2) of the Michigan Sanitary Waste Management Act (the "Waste Importation Restrictions") were adopted in December of 1988 and became effective immediately. By their express terms, such sections prohibit the acceptance of out-of-county waste, including all out-of-state waste, at any privately or publicly owned landfill within any county in the State of Michigan unless such acceptance is explicitly authorized in an approved county solid waste management plan.[3] At the time that the Waste Importation Restrictions became effective, and at all times thereafter, the solid

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[3] In order to be approved under the Michigan Sanitary Waste Management Act, a county solid waste management plan must be adopted by the county board of commissioners, and approved by the governing bodies of not less than 67% of the municipalities within such county and the director of the Michigan Department of Natural Resources. Mich. Comp. Laws Ann. §§ 299.427(f), 299.429 (1984); Michigan Comp. Laws Ann. §§ 299.428(2), 299.428(4) (1991 Supp.).

waste management plan of St. Clair County, Michigan, did not authorize the acceptance of out-of-state waste at any sanitary landfill, public or private, within the county. Consequently, the Waste Importation Restrictions prohibited Petitioner, which owns and operates a private sanitary landfill in St. Clair County, from accepting out-of-state waste for disposal at its landfill.[4]

Petitioner commenced this action in March, 1989, in the United States District Court for the Eastern District of Michigan, Southern Division, seeking a declaratory judgment that the Waste Importation Restrictions violate the Commerce Clause of the Constitution of the United States because they impermissibly discriminate against the disposal of waste generated out-of-state, as compared to waste generated in-county, at privately-owned[5] landfills in St. Clair County.[6] The District Court had jurisdiction pursuant to 28 U.S.C. § 1331.

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[4] Petitioner applied to the St. Clair County Metropolitan Planning Commission in February of 1989 requesting authorization to accept for disposal 1750 tons of solid waste per day, including out-of-state waste. In such application Petitioner agreed to reserve in its landfill sufficient space to dispose of all waste generated within St. Clair County for the next twenty years. However, Petitioner's application was rejected by such Commission, whose Commission Staff Report noted the County's policy banning importation of any waste, whether generated in other Michigan counties or out-of-state.

[5] This case does not raise the issue of whether the state or its counties may restrict the acceptance of out-of-state waste at county or state owned landfills. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 n. 6 (1978).

[6] Petitioner also claimed before the District Court and the Court of Appeals that the refusal by the St. Clair County authorities to amend the County's solid waste management plan so as to authorize the importation of out-of-state waste violated the Commerce Clause and the Fourteenth Amendment Due Process Clause of the Constitution, both of which claims were rejected by both courts. Petitioner does not seek review of the denial of its claims that such refusal was unconstitutional. Instead, Petitioner only seeks review of the denial of its claim that the legislation authorizing such refusal discriminates against interstate commerce.

The District Court denied Petitioner's request for a declaratory judgment that the Waste Importation Restrictions violate the Commerce Clause of the Constitution. In doing so, the District Court noted that the prior decisions of this Court required it to determine whether the Michigan Sanitary Waste Management Act, "either on its face or in its effect, discriminates against interstate commerce, or whether the [Michigan Sanitary Waste Management Act] regulates evenhandedly, with only incidental effects on interstate commerce." 732 F.Supp. 761, 764 (17a). The District Court then stated that "determination of a statute's facial validity requires an evaluation of whether the statutory language expresses favorable treatment to in-state entities", *Id.* at 764 (17a), and it concluded that the Michigan Sanitary Waste Management Act, because it applied "equally to Michigan counties outside the county . . . as well as to out-of-state entities", did not discriminate against interstate commerce on its face. *Id.* at 764 (18a). The District Court went on to hold that the Waste Importation Restrictions did not discriminate, in practical effect, against interstate commerce since the Michigan Sanitary Waste Management Act did not impose a "flat prohibition against the importation of out-of-state waste into Michigan's landfills," but rather "grants each county discretion in accepting or denying importation of waste from any outside source." *Id.* at 764 (18a).

Based on such analysis, the District Court concluded that the Michigan Sanitary Waste Management Act imposes only "incidental effects upon interstate commerce, and may therefore be upheld unless the burden imposed 'is clearly excessive in relation to the putative local benefits.' " 732 F.Supp. at 765 (18a) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Noting that the Michigan Sanitary Waste Management Act was adopted for various cited putative local benefits and that Petitioner had not posited that it was a "practical impossibility" for any out-of-state generator to utilize Michigan's landfills, the District Court, applying the *Pike v.*

Bruce Church test, concluded that the "incidental effect on interstate commerce imposed by the [Michigan Sanitary Waste Management Act] is not clearly excessive in relation to the benefits derived by Michigan from the statute." *Id.* at 765 (19a). The Court therefore held that the Waste Importation Restrictions were not violative of the Commerce Clause of the United States Constitution.

On appeal, the Court of Appeals rejected Petitioner's contention that the Waste Importation Restrictions discriminate against out-of-state waste, noting that the Michigan Sanitary Waste Management Act "does not treat out-of-county waste from Michigan any differently than waste from other states." 931 F.2d 413, 417 (9a). Thereafter, after apparently approving the determination of the District Court that the Michigan Sanitary Waste Management Act does not discriminate in practical effect against out-of-state waste because it grants each county discretion to accept or reject such waste, the court went on to hold that the District Court had properly determined that the Michigan Sanitary Waste Management Act " 'imposes only incidental effects upon interstate commerce, and may therefore be upheld' unless clearly excessive as compared to local benefits under *Pike*." *Id.* at 417-18 (10a). Noting that the Michigan Sanitary Waste Management Act provided for a "comprehensive plan for waste disposal, through which appropriate planning for such disposal can result", *Id.* at 418 (10a), the court concluded "that the attack on the facial constitutionality of the Michigan statute in question must fail." *Id.* at 418 (10a).

REASONS FOR GRANTING THE WRIT

I.

THE OPINION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND RAISES SUBSTANTIAL QUESTIONS OF CONSTITUTIONAL LAW

The basic principles which must be applied in determining whether a state statute which burdens interstate commerce

violates the Commerce Clause have long been established. As this Court stated in *Pike v. Bruce Church, Inc.:*

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

397 U.S. 137, 142 (1970). On the other hand, as this Court explained in *Maine v. Taylor:*

> Once a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.

477 U.S. 131, 138 (1986) (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

The foregoing principles are not in dispute in this case and were recited in the decisions below. Moreover, it is undisputed that, under this Court's decision in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), (1) the interstate movement of solid waste constitutes commerce within the meaning of the Commerce Clause, 437 U.S. at 622-23, and (2) state legislation which prohibits the importation of solid waste from out-of-state, unless and until a state agency, in its discretion, adopts new or amended regulations authorizing such importation, discriminates against interstate commerce. 437 U.S. at 618-19, 627.

On its face, the Michigan Sanitary Waste Management Act, both directly and by incorporating the existing St. Clair

County solid waste management plan, treats waste generated in-county differently from otherwise identical waste generated out-of-county, including waste generated out-of-state, by allowing only waste generated in-county to be accepted for disposal at privately-owned landfills in the county unless the county, in its discretion (and then only with the approval of its municipalities and the State Department of Natural Resources), elects to amend its presently exclusionary solid waste management plan so as to permit such importation. Thus the Act facially discriminates between waste generated out-of-state, as compared to waste generated in-county, by barring out-of-state residents from disposing their solid waste at private landfills within the county.[7] Nonetheless, both the District Court and the Court of Appeals determined that the Michigan Sanitary Waste Management Act does not "discriminate against interstate commerce" because, as stated by the Court of Appeals, the Michigan Sanitary Waste Management Act "does not treat out-of-county waste from Michigan any differently from waste from other states." 931 F.2d at 417 (9a). Accordingly, the courts below applied the balancing test of *Pike v. Bruce Church, Inc.* to determine the constitutionality

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[7] The fact that Petitioner could seek to persuade the county, municipal and state authorities to adopt and approve an amendment to the existing solid waste management plan which, if so adopted and approved, would permit the importation of out-of-state solid waste is no more relevant in the instant case than was the fact that the City of Philadelphia or Polar Ice Cream and Creamery Co. could have sought to persuade the New Jersey or Florida regulators to amend the exclusionary state regulations which were promulgated under the statutes which were found to be unconstitutional in *City of Philadelphia v. New Jersey* and in *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 361 (1964), discussed below. In any event, the Waste Importation Restrictions facially discriminate against out-of-state waste by requiring Petitioner or its potential out-of-state customers to bear the burden of persuading the county, municipal and state authorities to so amend the county waste management plan, while county residents are free to dispose of their otherwise identical solid waste at the same landfill without having to seek any such amendment.

of the Michigan Sanitary Waste Management Act, instead of subjecting such Act to the "more demanding scrutiny", *see Maine v. Taylor*, 477 U.S. 131, 138, which would have been required under *Hughes v. Oklahoma*, 441 U.S. 322 (1979), if the courts had determined that such Act discriminated against interstate transactions. Therefore, the courts below did not address the issue of whether the state had sustained the burden of demonstrating that its purported purpose in enacting the Waste Importation Restrictions "could not be served as well by available nondiscriminatory means." 477 U.S. at 138.[8]

By so determining that the Michigan Sanitary Waste Management Act does not discriminate against interstate commerce because it also discriminates against some in-state commerce, the decisions below directly conflict with this Court's decision in *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), and other decisions of this Court which stand for the principle that "it is immaterial," for purposes of determining whether legislation discriminates against interstate commerce, "that [other in-state commerce] is subjected to the same proscription as that moving in interstate commerce." *Dean Milk*, 340 U.S. at 354 n.4.

In *Dean Milk*, this Court invalidated a Madison, Wisconsin ordinance which prohibited the sale of pasteurized milk within the City of Madison unless such milk had been processed and bottled at an approved pasteurization plant within a radius of five miles from the central square of Madison. Similar to the Michigan Sanitary Waste Management Act, the Madison ordinance subjected most Wisconsin milk to the same proscription as out-of-state milk. Nonetheless, the Court held that the

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[8] In this connection, it is noteworthy that this Court held in *City of Philadelphia v. New Jersey* that the State of New Jersey had not satisfied the burden of demonstrating that its purported purpose in barring out-of-state waste could not be served as well by available nondiscriminatory means since it could be assumed that the State had available the means of "slowing the flow of *all* waste into the State's remaining landfills . . . ." 437 U.S. at 626.

ordinance "plainly discriminates against interstate commerce", 340 U.S. at 354, noting that "it is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce. *Cf. Brimmer v. Rebman*, 138 U.S. 78, 82-83 (1891)." 340 U.S. at 354 n.4. The Court continued on to hold that the Madison ordinance violated the Commerce Clause because reasonable non-discriminatory alternatives, adequate to serve legitimate local interests, were available.

In *Brimmer v. Rebman*, which was cited in the above-quoted footnote to *Dean Milk*, the Court held that a Virginia statute which in effect prohibited the sale within Virginia of meat from animals which had been slaughtered 100 miles or more from the place of sale impermissibly discriminated against interstate commerce, even though it applied equally to sales of meat from animals which had been slaughtered in Virginia and thereafter transported 100 or more miles within Virginia and to sales of meat from animals which had been slaughtered in another state and transported 100 or more miles into Virginia. *See* 138 U.S. at 81-83. Similarly, in *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 361 (1964), this Court held that a Florida statute and regulations thereunder which required a local milk processor and distributor to purchase to the extent possible all of its Class I milk requirements at a fixed price from producers located within a four county marketing area imposed an impermissible burden on interstate commerce, notwithstanding the fact that the same statute applied so as to limit the right of the distributor to buy milk which was produced in Florida, but outside the four county marketing area.

By ignoring the teachings of *Dean Milk, Brimmer v. Rebman* and *Polar Ice Cream and Creamery Co.* and holding that state legislation which excludes interstate commerce from local areas will not be deemed to discriminate against interstate commerce so long as other non-local, in-state commerce is

subject to the same prohibitions, the courts below have espoused a new principle which will have pernicious effects on the application of the Commerce Clause to future protectionist state legislation. Specifically, if the decisions of the courts below were correct[9], then, notwithstanding the prior decisions of this Court which have heretofore constrained both state and local discrimination against out-of-state commerce, a state would hereafter be permitted to enact legislation which authorized, and/or required compliance with, legislation or regulations of existing local governmental entities or newly established regional districts within the state prohibiting the importation of, or imposing discriminatory taxes upon, numerous articles of commerce, such as milk, meat, alcohol and ethanol, as well as waste, which are produced outside the boundaries of such entities or districts, unless those who were adversely affected by such burdens could show that the burdens imposed on such commerce were not "clearly excessive in relation to the puta-

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[9] As discussed below, see *infra* text accompanying notes 11-13, the same pernicious principle appears to have been applied by the Ninth Circuit in *Evergreen Waste Systems, Inc. v. Metropolitan Service District*, 820 F.2d 1482 (9th Cir. 1987), and by the Eleventh Circuit in *Diamond Waste, Inc. v. Monroe County, Georgia*, 939 F.2d 941 (11th Cir. 1991). In each instance these courts, as well as the courts below, evidently recognized that state legislation constitutes "economic protectionism" where it has a discriminatory purpose or effect, see *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 270 (1984), but they nonetheless concluded that state legislation which bars the importation into a county of out-of-state waste cannot be deemed to be discriminatory, and therefore to constitute economic protectionism, if some citizens of the State are subject to the same proscriptions. However, it cannot be disputed that the Waste Importation Restrictions place the citizens of St. Clair County in a position of "economic isolation", *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 527 (1935), and therefore have a protectionist effect. Moreover, as this Court wrote in *Brimmer v. Rebman*, " 'a burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute'." 138 U.S. at 83 (citing *Minnesota v. Barber*, 136 U.S. 313, 326 (1890)).

tive local benefits" sought to be achieved by such legislation. See *Pike v. Bruce Church, Inc.*, 397 U.S. at 142. For example, if it were true, as the courts below have held, that it is permissible under the Commerce Clause to favor in-county generated articles of commerce over out-of-county and out-of-state generated articles of commerce, so long as the *Pike* test can be satisfied, then, notwithstanding the Court's decision in *Dean Milk*, the City of Madison could now adopt an ordinance which restricted the importation of milk pasteurized outside the City limits provided that it could persuade a court that the ordinance, because it only affected milk sold in Madison, did not impose a burden on interstate commerce which was clearly excessive in relation to the putative local benefits sought to be achieved by such ordinance. Similarly, under the decisions below, and notwithstanding this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the State of Hawaii could authorize the City of Honolulu to impose a sales tax on all liquor which was distilled outside the City limits, provided that it could be shown that the exemption for liquor distilled inside the City served a local purpose of fostering local distilleries of okolehao and, therefore, would only have trivial effects on interstate commerce, thereby satisfying the *Pike* test.[10] As a consequence, it is inevitable that the decisions below, if allowed to stand, will, as Justice Clark warned in *Dean Milk*, "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause," 340 U.S. at 356, and will effectively subvert the principle which was reiterated in *Dean Milk* that " 'one state in its dealings with another may not place itself in a position of economic isolation' *Baldwin v.*

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[10] By contrast, this Court has heretofore held that where a state has erected discriminatory state-wide barriers to interstate commerce, it is irrelevant, for purposes of determining whether such barriers violate the Commerce Clause under the *Hughes v. Oklahoma* test, that the effect of such barriers on interstate commerce is insubstantial. *See New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 275 (1988); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 269 (1984).

Seelig, Inc., [294 U.S. 511] at 527." *Id.* at 356. For this reason alone, review by the Court of the decision below is warranted.

II.

THE OPINION BELOW RAISES IMPORTANT ISSUES OF NATIONAL SIGNIFICANCE WHICH ARE UNLIKELY TO BE SATISFACTORILY RESOLVED BY THE COURTS OF APPEALS

In *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), this Court held that a New Jersey statute which banned the importation of out-of-state waste into New Jersey for disposal in New Jersey landfills, unless such importation were authorized under regulations promulgated by the State Department of Environmental Protection, impermissibly discriminated against articles of commerce coming from out-of-state since it "imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space" and constitutes an impermissible "attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." 437 U.S. at 628. In so ruling, the Court wrote:

> Today, cities in Pennsylvania and New York find it expedient or necessary to send their waste into New Jersey for disposal, and New Jersey claims the right to close its borders to such traffic. Tomorrow, cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States might then claim the right to close their borders. The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.

437 U.S. at 629.

Unfortunately, today, by reason of the decisions below, cities outside Michigan which find it expedient or necessary to send their waste to Petitioner's landfill in St. Clair County, Michigan, cannot do so because Michigan has closed the borders of that county to such traffic until such time, if ever, as St. Clair County, in its discretion and then only with the approval of its municipalities and the State, elects to amend its solid waste management plan so as to permit acceptance of such waste. Indeed, Michigan has closed the borders of all of its counties to such traffic unless and until they elect individually to accept such waste. Moreover, tomorrow, cities outside a number of other states may not be able to send their waste to private landfills within existing municipalities or other newly-created regional districts within such states since such states, based on the decisions below as well as a similar recent decision of the Court of Appeals for the Ninth Circuit, now appear to be entitled to close the borders of such municipalities or districts to such traffic.

As noted above, the court below held that the Michigan Sanitary Waste Management Act does not discriminate against interstate commerce because it treats out-of-county waste from within Michigan in the same manner as out-of-state waste. Based upon such conclusion, the court below then applied the flexible balancing test of *Pike* and concluded that the Michigan Sanitary Waste Management Act did not violate the Commerce Clause. In like manner, the Court of Appeals for the Ninth Circuit has held in *Evergreen Waste Systems, Inc. v. Metropolitan Service District*, 820 F.2d 1482 (9th Cir. 1987), that a municipal ordinance which barred the disposal at municipal landfills of wastes from without the municipality did not discriminate against interstate commerce because it barred most Oregon waste as well as out-of-state waste. The court went on to apply the *Pike* test and determined that the ordi-

nance did not violate the Commerce Clause.[11] Recently, moreover, the Court of Appeals for the Eleventh Circuit has held, in *Diamond Waste, Inc. v. Monroe County, Georgia*, 939 F.2d 941 (11th Cir. 1991), that a Georgia statute authorizing a county to prohibit the importation of out-of-county waste without county approval, as well as the county resolution which actually barred such waste, did not constitute economic protectionism against out-of-state commerce, notwithstanding the fact that it permitted on-going disposal at a landfill located within the county of waste generated in-county, since it treated out-of-county and out-of-state waste "even-handedly."[12] Thus, three courts of appeals have now held that a state may erect a county or municipal barrier to out-of-state waste without being deemed to have thereby discriminated against interstate commerce so long as other in-state waste is likewise prohibited

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[11] While it has been properly suggested that *Evergreen* might have been decided under the so-called market participant exemption to the Commerce Clause, the opinion of the court in *Evergreen* makes no reference to the market participant exemption and evidently was not based upon that exemption. *See BFI Medical Waste Systems, Inc. v. Whatcom County*, 756 F. Supp. 480, 485 (W.D. Wash. 1991).

[12] Notwithstanding such holding, the *Diamond Waste* court also determined that the county's absolute ban on waste generated out-of-county imposed a burden on interstate commerce which was clearly excessive in relationship to the putative local benefits sought to be achieved by the ban since, in the view of the court, those benefits could have been achieved by constraints on the importation of out-of-state waste which would have had a lesser impact on interstate commerce, such as imposing limits on the amount of out-of-state generated waste which could be imported into the county. Accordingly, the Court of Appeals held that the county ban on out-of-state waste violated the Commerce Clause under the *Pike* test. 939 F.2d at 944-46. Thus, since the decision below held that, under the *Pike* test, Michigan could impose an absolute ban on the importation of out-of-state waste into St. Clair County, the decision below actually conflicts with the decision of the Court of Appeals for the Eleventh Circuit in *Diamond Waste*. Nevertheless, both decisions stand for the same pernicious principle that a state or a municipality thereof may curtail the importation of out-of-state waste into a county for disposal at a private landfill in a manner which discriminates in favor of waste generated within the county.

from crossing the barrier. As a result of these decisions, and notwithstanding *Dean Milk, Brimmer v. Rebman* and *Polar Ice Cream and Creamery Co.*, it now appears that while a state cannot directly prohibit or discriminatorily burden the importation of out-of-state waste, it can authorize, and/or require compliance with, county legislation or regulations which do so, albeit only on a county-wide basis. Thus, while this Court pointed out in *City of Philadelphia v. New Jersey* that a state "may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders," 437 U.S. at 627 (citing *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911) and *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923)), it now appears that a state can authorize its constituent counties to hoard their own landfills, so long as they prevent residents of other counties, as well as out-of-state residents, from having access to such resources, unless and until some plaintiff can demonstrate that the resulting burden on interstate commerce is clearly excessive in relation to the putative local benefits. Unfortunately, none of *Dean Milk, Brimmer v. Rebman* and *Polar Ice Cream and Creamery Co.* were discussed or even cited in either the opinion of the court below or the opinion of the Court of Appeals for the Ninth Circuit in *Evergreen*.[13]

The issue of whether a state may "isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade", *City of Philadelphia v. New Jersey*, 437 U.S. at 628, is as critical today as it was when the Court handed down its decision thereon in 1978. Notwithstanding

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[13] *Dean Milk* was mentioned in *Diamond Waste, Inc.*, 939 F.2d at 945, but it was cited for the proposition that, by absolutely banning out-of-county waste, the county had imposed a burden on interstate commerce which was excessive in relation to the local benefits sought to be achieved by the ban. However, as noted above, *see supra* note 12, it is clear from the opinion that the *Diamond Waste* court was of the view that the county could impose discriminatory burdens on out-of-state waste so long as such burdens were not "excessive." *See* 939 F.2d at 946.

the Court's decision in *City of Philadelphia v. New Jersey*, Indiana and Ohio, in addition to Michigan, have recently attempted to impose new and creative barriers or obstacles to the interstate transportation of solid waste across their borders.[14] To date, these recent efforts to impose *state-wide* barriers or obstacles to the interstate transportation of solid waste have been rejected by the lower courts, based upon this Court's decision in *City of Philadelphia v. New Jersey*.[15] By contrast, Michigan's efforts and those of counties or municipalities in Georgia, California and New York to impose county or district barriers to such traffic have now been approved by the Court of Appeals for the Sixth Circuit in the decision below, the Court of Appeals for the Ninth Circuit in *Evergreen*, the Court of Appeals for the Eleventh Circuit in *Diamond Waste* (although the latter court ruled that under *Pike* the barrier could

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[14] *See* Ind. Code Ann. §§ 13-9.5-5-1, 13-7-22-2.7(c)(1), 13-7-22-2.7(c)(2) (Burns 1991 Supp.) (imposing discriminatory "tipping fees", requiring certification by out-of-state entities, but not in-state entities, that wastes were not hazardous and requiring disclosure on a discriminatory basis of the point of waste generation); Ohio Rev. Code Ann. § 3734.57 (Page 1990 Supp.) (imposing a discriminatory state tax on out-of-state waste and authorizing the imposition by counties of discriminatory fees on out-of-state waste) and § 3734.131 (requiring consent to jurisdiction and service of process by out-of-state entities prior to transportation of their out-of-state waste into Ohio).

[15] *See National Solid Waste Management Association v. Voinovich*, 763 F. Supp. 244 (S.D. Ohio 1991); *Government Suppliers Consolidation Serv. v. Bayh*, 753 F. Supp. 739 (S.D. Ind. 1990). While the instant case involves a sanitary landfill and not hazardous wastes, it is noteworthy that other recent cases have held that under the Commerce Clause the states may not bar the disposal of hazardous waste on a discriminatory basis. *See, e.g., National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Protection*, 910 F.2d 713 (11th Cir. 1990), *modified on other grounds*, 942 F.2d 1001 (11th Cir. 1991), *cert. denied*, 115 L. Ed.2d 973, 111 S. Ct. 2800, 59 U.S.L.W. 3823 (1991).

not be absolute), and by Federal district courts in New York.[16] The questions of whether such local barriers to interstate waste should be allowed to stand without any showing that the purposes thereof could not be served as well by available nondiscriminatory means and whether those who live behind such barriers should be accorded an exclusive right of access to local privately-owned landfills are far too important to be left to the lower courts which seem ready to accept a new doctrine that, while the states may not bar or discriminate against out-of-state waste, the counties therein may do so as long as they likewise discriminate against waste from other counties within the state.

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[16] *See County of Washington v. Casella Waste Management, Inc.*, 1990 U.S. Dist. Lexis 16941, No. 90-CV-513 (N.D.N.Y. 1990) (county ordinance barring out-of-county waste does not violate the Commerce Clause). *Accord, Omni Group Farms, Inc. v. County of Cayuga*, 766 F. Supp. 69 (N.D.N.Y. 1991). In the *County of Washington* case, the court expressly rejected the reasoning of the Court of Appeals of New York in *Dutchess Sanitation Service, Inc. v. Town of Plattekill*, 51 N.Y.2d 670, 435 N.Y.S.2d 962, 417 N.E.2d 74 (1980), that under the Commerce Clause a county may not exclude the importation of out-of-state solid waste even if out-of-county solid waste from within New York State was similarly excluded.

CONCLUSION

This case presents the simple question of whether Michigan or any other state may authorize, or require compliance with, county legislation or regulations which prohibit the disposition of out-of-state, as well as out-of-county, waste at privately owned landfills located within such county, thereby preserving such landfills for the exclusive benefit of the residents of such county. It thus raises the question of whether *City of Philadelphia v. New Jersey* should remain the law of the land. However, if *City of Philadelphia v. New Jersey* is to be overruled, then only this Court should do so. On the other hand, if *City of Philadelphia v. New Jersey* is not to be overruled, then this Court should not permit it to be subverted by the adoption of a pernicious new principle, espoused by the courts below as well as by the Courts of Appeals for the Ninth Circuit and the Eleventh Circuit, that, notwithstanding *Dean Milk*, the erection of local barriers to interstate commerce does not constitute discrimination against interstate commerce so long as other in-state commerce is subjected to the same proscription. Such a pernicious principle cannot be permitted to stand since it invites localities throughout the country to enact legislation which discriminates against articles of commerce generated outside of such localities, including articles of interstate commerce, and to create thereby a "multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Dean Milk*, 340 U.S. at 356. Accordingly, a writ of *certiorari* should issue to review the decision below.

Dated: October 12, 1991

Respectfully submitted,

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APPENDICES

APPENDIX A

BILL KETTLEWELL EXCAVATING, INC.,
Plaintiff-Appellant,

v.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, David Hales, St. Clair County Health Department, John B. Parsons, St. Clair Metropolitan Planning Commission, Gordon Ruttan, St. Clair Solid Waste Planning Committee, Peg Clute, *Defendants—Appellees*

No. 90-1361.

UNITED STATES COURT OF APPEALS,

SIXTH CIRCUIT.

Argued Nov. 29, 1990. Decided May 1, 1991.

Rehearing and Rehearing En Banc
Denied July 16, 1991.

ROBERT A. FINEMAN (argued), DANIEL P. PERK, HONIGMAN, MILLER, SCHWARTZ & COHN, Detroit, Mich., DAVID R. HEYBOER, LUCE, HENDERSON, BANKSON, HEYBOER & LANE, PORT HURON, MICH., for BILL KETTLEWELL EXCAVATING, INC.

LEO H. FRIEDMAN, Office of the Atty. Gen. of Mich., JAMES E. RILEY (argued), THOMAS J. EMERY, RAYMOND O. HOWD, Office of the Atty. Gen. Natural Resources Div., Lansing, Mich., for MICHIGAN DEPT. OF NATURAL RESOURCES and DAVID HALES.

LAWRENCE R. TERNAN (argued), MARGARET B. KIERNAN, BEIER, HOWLETT, P.C., BLOOMFIELD HILLS, MICH.,

ROBERT H. CLELAND, COUNTY OF ST. CLAIR PROSECUTOR'S OFFICE, PORT HURON, MICH., for ST. CLAIR COUNTY HEALTH DEPT., JOHN B. PARSONS, ST. CLAIR METROPOLITAN PLANNING COM'N, GORDON RUTTAN, ST. CLAIR SOLID WASTE PLANNING COMMITTEE AND PEG CLUTE.

Before NORRIS, Circuit Judge, WELLFORD, Senior Circuit Judge,* and FORESTER, District Judge.**

WELLFORD, Senior Circuit Judge.

Plaintiff, Bill Kettlewell Excavating, Inc., d/b/a Fort Gratiot Sanitary Landfill (Kettlewell), has owned and operated a landfill in St. Clair County, Michigan since 1971. In 1988 the stock of Kettlewell was purchased by new owners and is allegedly controlled by out-of-state corporations. The new owners assert that since they bought Kettlewell's stock they need not reapply for a new landfill license, as demanded by the County defendants, and this issue is presently pending in the Michigan Court of Appeals. We need not address this issue in this opinion.

Kettlewell operates its private landfill under a 1987 license issued by the Michigan Department of Natural Resources (MDNR) pursuant to the Michigan Solid Waste Management Act (MSWMA), subsequently amended, and now challenged by plaintiff in the present controversy. Kettlewell seeks to handle and to dispose of solid waste from outside Michigan, claiming that it is no different in kind and character from in-state solid waste being currently handled at Fort Gratiot Sanitary Landfill.

The MSWMA provides for a state-wide regulatory scheme for disposal of solid waste and delegates much of the responsi-

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* The Honorable Harry W. Wellford assumed senior status on January 21, 1991.

** The Honorable Karl S. Forester, United States District Judge for the Eastern District of Kentucky, sitting by designation.

bility for planning to the individual counties. The MSWMA was amended in late 1988 to provide as follows:

> A person shall not accept for disposal solid waste . . . that is not generated in the county in which the disposal area is located unless the acceptance of solid waste . . . that is not generated in the county is explicitly authorized in the approved county solid waste management plan.

Mich.Stat.Ann. § 13.29(13a), [M.C.L.A. § 299.413a].

> In order for a disposal area to serve the disposal needs of another county, state, or country, the service . . . must be explicitly authorized in the approved solid waste management plan of the receiving county.

Mich.Stat.Ann. § 13.29(30)(2), [M.C.L.A. § 299.430(2)].

On February 13, 1989, Kettlewell submitted an application to the St. Clair County Solid Waste Planning Committee requesting authorization for disposal of solid waste, including out-of-state waste. In the application Kettlewell agreed to reserve sufficient space to dispose of all solid waste generated within St. Clair County for the next twenty years. Kettlewell's application was denied promptly by defendant Planning Committee.

There seems to be no disagreement that the County Solid Waste Planning Committee is merely an advisory body. The normal next step in approval for a landfill is approval by the County Board of Commissioners and two-thirds of the communities within the county. Once this approval is received final approval must then be obtained under the statutory scheme from the MDNR. The St. Clair County Board of Commissioners and MDNR have not yet acted on the application in question.

Within two weeks of the disapproval by the Planning Committee, Kettlewell sought declaratory judgment contending unconstitutionality of the amendments under the commerce

clause in the district court.[1] The defendants, MDNR, the County Health Department and its Planning Commission, brought a motion to dismiss on jurisdictional grounds which the district court first denied.[2] Subsequently, the district court denied summary judgment to Kettlewell on the merits of the case. 732 F.Supp. 761.

Kettlewell contends that its application involving out-of-state solid waste was denied based on defendants' "policy to ban all out-of-state waste." Kettlewell's Brief at 2. The complaint states that the 1988 amendments to MSWMA impose "an absolute ban on the disposal of out-of-state waste without County approval," and that "MDNR and St. Clair [County] have, by prior legal action, indicated an intention not to permit Kettlewell to dispose of any solid waste originating from outside the State of Michigan at the Fort Gratiot Sanitary Landfill."

In a prior counterclaim filed in a Michigan court in a suit involving these parties, the County defendants stated:

> St. Clair County has prepared a plan pursuant to Act 641 and it has been approved by the DNR Director. This plan, which adequately provides for the disposal of solid refuse within the county, does not include provisions for waste

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1 Kettlewell has subsequently raised due process contentions.

2 The defendants claimed in that motion that Kettlewell's declaratory judgment action was really a collateral attack on the district court's earlier remand of an earlier controversy to state court, or a defense to the defendants' state court counterclaim, or that no controversy existed between the parties. The district court disagreed finding that Kettlewell was seeking declaratory judgment on the constitutionality of the MSWMA amendments which had not come into effect at the time of the remand. It noted that no state court action was currently pending and found that Kettlewell's attempt to gain permission to import waste was denied demonstrating that the amendments may have been enforced against Kettlewell and thus Kettlewell's claim was no longer a mere defense to a state court action. The district court noted that its decision would resolve the constitutional issue between the parties.

> originating outside the county from being disposed of at facilities within the county, except for certain limited specified instances.

The answer of the County defendants conceded that the Planning Committee had decided not to allow disposition of out-of-state waste. The County defendants also indicated that an "update" of the St. Clair County Solid Waste Management Plan was "in the process of being prepared and submitted [to MDNR] for approval." MDNR denied there was any absolute ban on out-of-state waste, but admitted that the present County plan did not permit disposal of solid waste "originating outside of St. Clair County."

Under MSWMA each Michigan county is required to submit a 20-year solid waste management plan to provide for such waste generated in the county, or, under certain conditions, in another Michigan county. Each county is also required to update the plan every five years. The St. Clair County plan was approved by MDNR in 1983, and was, therefore, supposed to be updated in 1988.

An earlier Michigan decision bears upon the actions of MDNR under MSWMA prior to the amendments in controversy and Kettlewell's authority to dispose of solid waste from another Michigan county in St. Clair County. The Michigan Court of Appeals held in *Fort Gratiot Charter Twp. v. Kettlewell,* 150 Mich.App. 648, 389 N.W.2d 468 (1986), that the other Michigan county (Macomb) and St. Clair County *both* had to provide affirmatively for such intercounty transfer of solid waste in their solid waste management plans for Kettlewell to handle Macomb County solid waste in its landfill in St. Clair County. The absence of such affirmative action by St. Clair County was also challenged in that case by Kettlewell as violating its constitutional due process rights. The Michigan court held that there was no due process violation, no unreasonable classification, and no "taking" of Kettlewell's property

under the circumstances. An additional Kettlewell challenge that MSWMA provided inadequate standards for issuance of permits and authority to dispose of out-of-county waste was deemed to be without merit. *See* 389 N.W.2d at 471. *See also County of Saginaw v. John Sexton Corp.*, 150 Mich.App. 677, 389 N.W.2d 144 (1986) (to the same effect as to disposition of waste from one Michigan county to another under MSWMA).

Here the district court found, in substance, that the Michigan statute did not expressly favor in-state entities since out-of-state entities and other Michigan counties were treated equally. It also found that the amendments did not constitute an outright ban against out-of-state waste and that the incidental effects were not clearly excessive compared to the claimed local benefits. The court also found that the county's policy prohibiting all out-of-county waste from being imported was even-handed and that the benefits of the policy outweighed its burden on interstate commerce so that there was no violation of the commerce clause as applied. Finally, the court dealt with the due process clause allegations by finding that the county's blanket prohibition of out-of-county waste importation obviated the need for guidelines for acceptance under the due process clause. Since the district court provided no relief upon its claim, Kettlewell now appeals.

We review the legal determinations of the district court de novo. We must ascertain, as did the district court, whether the MSWMA amendments represent on their face or as applied

> basically a protectionist measure, or whether [they] can fairly be viewed as [ ] law[s] directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.

City of Philadelphia v. New Jersey, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1978). If the amendments are simply aimed at economic protectionism, the defendants must hurdle a "virtual [ ] *per se* rule of invalidity" to survive constitutional challenge. *Id.* at 624, 98 S.Ct. at 2535. If, however,

the amendments serve a legitimate public interest, and only incidentally burden interstate commerce, the amendments "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970) (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443, 80 S.Ct. 813, 815, 4 L.Ed.2d 852 (1960)). In evaluating the protectionist character of legislation, courts must assess "legislative means as well as legislative ends." *Philadelphia,* 437 U.S. at 626, 98 S.Ct. at 2537.[3]

The basic question in this case, therefore, is whether the MSWMA amendments, facially or as applied, serve an economic protectionist purpose. In *Philadelphia,* the New Jersey statute in question provided that

> [n]o person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, . . . until the commissioner [of the State Department of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State.

N.J.Stat.Ann. § 13:11-10 (West Supp.1978) (as cited in *Philadelphia*, 437 U.S. at 618-19, 98 S.Ct. at 2532-33). New Jersey authorities under that law, promulgated regulations effectively banning importation of out-of-state landfills in New Jersey.

The New Jersey statute in *Philadelphia* expressed a purpose of protecting the state's environment through limiting the vol-

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[3] Economic protectionism may be proven either by establishing a statute's discriminatory purpose, Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 349-50, 97 S.Ct. 2434, 2444-45, 53 L.Ed.2d 383 (1977) or discriminatory effect, Philadelphia, 437 U.S. at 626, 98 S.Ct. at 2536.

ume of waste into state landfills. Despite this purpose, the Supreme Court determined the law to be discriminatory under the commerce clause:

> [I]t does not matter whether the ultimate aim of [the statute] is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, [the statute] violates this principle of nondiscrimination.

437 U.S. at 626-27, 98 S.Ct. at 2537.

With respect to a commerce clause/police power analysis, in *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2447, 91 L.Ed.2d 110 (1986), the Supreme Court held that "Once a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." (Citations omitted).[4]

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[4] Although the Supreme Court in *Philadelphia* did not expressly discuss the second factor concerning alternative means, it may have considered this factor when it noted that "it may be assumed . . . that New Jersey may pursue [its legislative] ends by slowing the flow of *all* waste into the State's remaining landfills. . . ." 437 U.S. at 626, 98 S.Ct. at 2537 (emphasis in original). Whether "slowing the flow" is equivalent to stopping entirely the flow of solid waste was not discussed.

Maine v. Taylor involved a Maine law banning importation of certain live baitfish into that state. The Supreme Court upheld the district court's legitimate local purpose finding for the baitfish importation ban. The state had contended that importation involved threats to its ecology through introduction of parasites and non-native species into Maine's waterways. The district court found support for the state's contention. Since there was a legitimate purpose found for the ban, the Supreme Court then discussed whether there was a less discriminatory alternative to the complete ban. Finding no error in the district court's factual findings, the Supreme Court approved its conclusion that no scientifically-accepted techniques existed for the sampling and inspection of live baitfish. The Supreme Court finally concluded that no less discriminatory alternative to an outright ban existed. 477 U.S. at 147, 106 S.Ct. at 2452.

Kettlewell argues that "in-county, in-state waste is not subject to the Amendments and, thus . . . is treated differently than all out-of-state waste." This argument ignores the language of § 13.29(13a) that "[i]n order . . . to serve the disposal needs of *another county, state, or country,* [it] . . . must be explicitly authorized in the . . . plan of the receiving county." (Emphasis added). Thus § 13.29(13a) language places in-county and out-of-county waste in separate categories, but it does not treat out-of-county waste from Michigan any differently than waste from other states.

Under all of the circumstances, we find no error in the conclusion of the district court that:

> [T]he MSWMA grants each county discretion in accepting or denying importation of waste from any outside source, including other counties within the State. Although ultimate authority for acceptance of a county's plan resides with a single official under the MSWMA, Mich. Comp.Laws Ann. §§ 299.425 and 299.429, the plaintiff has not alleged that this official has used this

authority to reject county plans proposing the importation of out-of-state waste.

Further, we find no error in the district court's ultimate conclusion that "MSWMA imposes only incidental effects upon interstate commerce, and may therefore be upheld" unless clearly excessive as compared to local benefits under *Pike*. MSWMA does, indeed, as found by Michigan courts and by the district court, provide a "comprehensive plan for waste disposal, through which appropriate planning for such disposal can result." Thus, we conclude that the attack on the facial constitutionality of the Michigan statute in question must fail.

We next examine the contention by plaintiff that the statute, as applied in St. Clair County, is unconstitutional as applied to the denial of the Kettlewell application. The effect of the Planning Commission action was to bar all solid waste importation from outside St. Clair County. The stated goal of St. Clair County's plan was to preserve, protect, and manage its landfills with respect to disposition of the County's own solid waste. This policy treats both out-of-county Michigan solid waste and outside Michigan solid waste equally. If, in fact, it were alleged or proven that all counties in Michigan, pursuant to MSWMA or MDNR direction or policy, banned out-of-state waste, we would be facing a different and difficult problem under *City of Philadelphia v. New Jersey*. Instead, we are now concerned with the policy in one Michigan county, authorized by state statute, which effectually bars importation of solid waste *into* the county. We find no error in the district court's additional holding that the effect of St. Clair County's action was not an unconstitutional imposition on interstate commerce under *Philadelphia* and *Pike*.

We note, moreover, that plaintiff brought this challenge without exhausting its administrative remedies under St. Clair County procedures and under Michigan law. We do not presume that a legitimate challenge to the Planning Committee's action, if arbitrary, unreasonable or illegal, might not be cured

by carrying an administrative appeal to the Board of Commissioners and/or MDNR. There is no allegation or showing that Michigan law would not provide an adequate remedy upon appeal or pursuit of a statutory remedy if the Planning Committee action, if supported by the county and MDNR, were baseless, capricious or motivated by an intent to discriminate against interstate commerce. By analogy in a county zoning context, see *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

Finally, we find no due process violation, nor any unconstitutional taking of Kettlewell's property rights by reason of the county action in controversy. Kettlewell may still utilize its landfill but not for out-of-county waste. It has not demonstrated any lack of procedural notice and opportunity to be heard. County denial of this Kettlewell application does not materially differ from County denial of a license or permit, or of a particular zoning. A disappointed applicant in these situations has no basis to claim a constitutional deprivation unless he pursues available administrative and statutory remedies to cure the error or violation about which he complains.

For the foregoing reasons, we AFFIRM the decision of the district court that no constitutional violation has occurred.

APPENDIX B

BILL KETTLEWELL EXCAVATING, INC., d/b/a Fort Gratiot Sanitary Landfill, *Plaintiff,*

v.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES; David Hales, Director of Michigan Department of Natural Resources; St. Clair County Health Department; John B. Parsons, Director of St. Clair County Health Department; St. Clair County Metropolitan Planning Commission, and Gordon Ruttan, Director; St. Clair County Solid Waste Planning Committee and Peg Clute, Chairperson, *Defendants.*

No. 89-CV-30015-PH.

UNITED STATES DISTRICT COURT,

E.D. MICHIGAN, S.D.

March 2, 1990.

DANIEL P. PERK, ROBERT A. FINEMAN, HONIGMAN, MILLER, DETROIT, MICH., DAVID R. HEYBOER, LUCE, HENDERSON, PORT HURON, MICH., for plaintiff.

FRANK J. KELLEY, Atty. Gen., THOMAS J. EMERY, LEO H. FRIEDMAN, Asst. Attys. Gen., Natural Resources Div., Lansing, Mich., for defendants DNR and HALES.

ROBERT H. CLELAND, ST. CLAIR COUNTY CORP. COUNSEL, PORT HURON, MICH., LAWRENCE R. TERNAN, BEIER HOWLETT TERNAN JONES SHEA & HAFELI, BLOOMFIELD HILLS, MICH., for all county defendants.

MEMORANDUM OPINION AND ORDER

JAMES HARVEY, District Judge.

Currently pending is the plaintiff's motion for summary judgment requesting the following alternative relief: (1) a declaration that Mich.Comp.Laws Ann. §§ 299.413a and 299.430(2) are unconstitutional to the extent they pertain to disposal of waste generated outside the State of Michigan, along with an injunction prohibiting their enforcement; or (2) a declaration that various St. Clair County governmental entities, defendants herein, unconstitutionally applied these sections in denying the plaintiff's application for a permit to import out-of-state waste to the Fort Gratiot Sanitary Landfill, along with an injunction prohibiting future unconstitutional permit denials.

All defendants have responded, and the Court has heard oral argument. The Court is now prepared to rule.

I.

The plaintiff raises the due process and commerce clauses of the United States Constitution as bars to the enforcement of certain amendments to the Michigan Solid Waste Management Act (MSWMA), Mich. Comp.Laws Ann. § 299.401 et seq. The challenged amendments provide as follows:

> A person shall not accept for disposal solid waste that is not generated in the county in which the disposal area is located unless the acceptance of solid waste that is not generated in the county is explicitly authorized in the approved county solid waste management plan.
>
> * * * * * *
>
> In order for a disposal area to serve the disposal needs of another county, state, or country, the service must be explicitly authorized in the approved solid waste management plan of the receiving county. With regard to intercounty service within Michigan, the service must also

be explicitly authorized in the exporting county's solid waste management plan.

Mich.Comp.Laws Ann. §§ 299.413a, 299.430(2). In February of 1989, the plaintiff applied to the St. Clair County Metropolitan Planning Commission (the Commission) for approval of a plan that would allow the disposal of 1750 tons of waste per day, from sources originating outside of the County, at the plaintiff's private landfill. In rejecting the plaintiff's application, and pursuant to the authority granted in the MSWMA amendments, the Commission's Staff Report notes the County's policy banning importation of any waste, whether generated in other Michigan counties or generated in other states, into the County's landfills. The plaintiff now urges that the MSWMA amendments, by requiring explicit county approval for disposal of out-of-state waste, impermissibly discriminate against interstate commerce by placing the burden on preserving Michigan's landfill space on other states. Alternatively, the plaintiff asserts that the Commission's denial of the plaintiff's application to import out-of-state waste involved an unconstitutional application of the amendments to the plaintiff, in that inadequate criteria exist for evaluating permit applications to satisfy due process.

II.

Resolution of these issues requires analysis of the several Supreme Court decisions addressing the "dormant" aspects of the commerce clause. More particularly, the Court must ascertain whether the MSWMA amendments represent "basically a protectionist measure, or whether [they] can fairly be viewed as [ ] law[s] directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 2536, 57 L.Ed.2d 475 (1978). If the amendments are simply aimed at economic protectionism, the defendants must hurdle a "virtual[ ] per se rule of invalidity" to survive constitutional

challenge. *Id.* at 624, 98 S.Ct. at 2535. If, however, the amendments serve a legitimate public interest, and only incidentally burden interstate commerce, the amendments "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970), citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443, 80 S.Ct. 813, 815-16, 4 L.Ed.2d 852 (1960). In evaluating the protectionist character of legislation, courts must assess "legislative means as well as legislative ends." *Philadelphia*, 437 U.S. at 626, 98 S.Ct. at 2537.

The critical question, therefore, is whether the MSWMA amendments, either through their means or their ends, serve an economic protectionist purpose. In *Philadelphia*, the New Jersey statute (ch. 363) provided that

> [n]o person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner [of the state Department of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State.

N.J.Stat.Ann. § 13:1I-10 (West Supp. 1978). The New Jersey commissioner, acting pursuant to the statute's authority, promulgated regulations banning, with limited exceptions, the importation of out-of-state waste to any of New Jersey's landfills.

The stature expressed its purpose as protecting New Jersey's environment through a limitation on the volume of waste transportable to state landfills. Notwithstanding this apparently legitimate purpose, however, the Supreme Court found the statute discriminatory and violative of the commerce clause:

> [I]t does not matter whether the ultimate aim of ch 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, ch 363 violates this principle of nondiscrimination.

437 U.S. at 626, 627, 98 S.Ct. at 2537. Thus, the Supreme Court dictated its general belief concerning the priority of the commerce clause vis-a-vis state police powers: regardless of the legitimacy of the local purpose underlying a statute, such statute will not be upheld if its enforcement requires direct discrimination against interstate commerce.

For every rule, however, there exists an exception. Respecting commerce clause/police power analysis, the exception is illustrated in *Maine v. Taylor,* 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986). There, the Supreme Court held that "once a state law is shown to discriminate against interstate commerce 'either on its face or in its practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Id.* at 138, 106 S. Ct. at 2447. Although the second factor, concerning alternative means, avoided express mention in *Philadelphia,* it appears the Supreme Court considered this factor when it noted that "it may be assumed that New Jersey may pursue [its legislative] ends by slowing the flow of *all* waste into the State's remaining landfills . . . ." 437 U.S. at 626, 98 S.Ct.

at 2537 (emphasis in original). In other words, there existed a less discriminatory alternative that would allow the protection of New Jersey's environment—banning all disposal of waste in the State's landfills.

Maine v. Taylor demonstrates application of these factors through the validation of a state law banning importation of certain species of live baitfish into Maine. First, the Supreme Court upheld the district court's finding of a legitimate local purpose for the importation ban. The State contended that such importation presented threats to the State's ecology through the introduction of parasites and non-native species into its waterways. The district court, after hearing evidence on this issue, concurred with the State's contention. Having found a legitimate purpose for the ban, the Supreme Court next addressed the issue of availability of a less discriminatory alternative to the ban. Again, the Supreme Court exhibited deference to the district court's factual findings, and refused to set aside the conclusion that no scientifically-accepted techniques existed for the sampling and inspection of live baitfish. Given this, and given earlier precedent holding that states are not required to develop new and unproven means in order to create nondiscriminatory methods of achieving a legislative goal, the Supreme Court agreed that no less discriminatory alternative to an outright ban existed. 477 U.S. at 147, 106 S.Ct. at 2452. Thus, the statute withstood commerce clause scrutiny.

III.

Application of the foregoing principles to the MSWMA amendments is admittedly difficult. At the outset, the Court must examine whether the MSWMA, either on its face or in its effect, discriminates against interstate commerce, or whether the MSWMA regulates evenhandedly, with only incidental effects on interstate commerce. Determination of a statute's facial validity requires an evaluation of whether the statutory language expresses favorable treatment to in-state entities. Thus, in *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979), a statute that expressly prohib-

ited the transportation of live minnows out of Oklahoma "on its face discriminate[d] against interstate commerce," and was therefore subject to "the strictest scrutiny." *Id.* at 336, 337, 99 S.Ct. at 1736, 1737. The MSWMA suffers from no such defect. Clearly, the requirement that importers appear in a county waste disposal plan applies equally to Michigan counties outside of the county adopting the plan as well as to out-of-state entities. The Court therefore finds that the MSWMA does not discriminate against interstate commerce on its face.

Next, the Court must ascertain whether the MSWMA, in practical effect, discriminates against interstate commerce. In this respect, it is important to recognize the functional difference between the New Jersey waste disposal statute at issue in *Philadelphia* and the MSWMA. Unlike the New Jersey law, the MSWMA does not place the authority to issue a blanket preclusion against the importation of all out-of-state waste into one state official's hands. Instead, the MSWMA grants each county discretion in accepting or denying importation of waste from any outside source, including other counties within the State. Although ultimate authority for acceptance of a county's plan resides with a single official under the MSWMA, Mich.Comp.Laws Ann. §§ 299.425 and 299.429, the plaintiff has not alleged that this official has used this authority to reject county plans proposing the importation of out-of-state waste. In this regard the MSWMA does not, through its means, discriminate against interstate commerce in the manner of the New Jersey statute. As implemented, the MSWMA poses no flat prohibition against the importation of out-of-state waste into Michigan's landfills. Thus, the Court finds that the MSWMA imposes only incidental effects upon interstate commerce, and may therefore be upheld unless the burden imposed "is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. at 846 (citation omitted).

Michigan promulgated the MSWMA as "[a]n act to protect the public health and the environment; to provide for the regulation and management of solid wastes; to prescribe the powers and duties of certain state and local agencies and officials; to prescribe penalties; to make an appropriation; and to repeal

certain acts and parts of acts." Act No. 641, Public Acts of 1978. Thus, the MSWMA's putative benefits include the provision of a comprehensive plan for waste disposal, through which appropriate planning for such disposal can result, as well as the protection of the public's health, safety, and welfare. The burden on interstate commerce appears to be the requirement that out-of-state waste generators appear on a county's plan prior to disposal. Again, the plaintiff does not posit that appearance on a county plan, while ostensibly an insubstantial burden, nevertheless is a practical impossibility for any out-of-state waste generator seeking to utilize Michigan's landfills. Without such an allegation, the Court concludes that the incidental effect on interstate commerce imposed by the MSWMA is not clearly excessive in relation to the benefits derived by Michigan from the statute. The Court therefore holds that the MSWMA is not violative of the commerce clause of the United States Constitution.

IV.

The Plaintiff alternatively argues that even if the MSWMA is facially constitutional, the defendant St. Clair County governmental entities unconstitutionally applied the MSWMA in denying the plaintiff's permit application. More specifically, the plaintiff urges that the County's stated prohibition against importation of any waste into the County's landfills directly violates the commerce clause.[1]

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[1] The Court notes that the plaintiff also appears to assert the fourteenth amendment due process clause in challenging the County's actions, citing *Geo-Tech Industries, Inc., et al. v. Hamrick*, 886 F.2d 662 (4th Cir.1989). *Hamrick*, however, involved a statute that empowered a state official to deny a waste disposal permit because it was "significantly adverse to the public sentiment." *Id.* at 663. Because no criteria existed for determining when a permit became so adverse, the court found an absence of "substantial or rational relationship between the statute's goals [of preserving community spirit and pride] and its means," and thus found the statute violative of the constitution's due process clause. *Id.* at 666.

The St. Clair county policy suffers no such infirmity. The stated blanket prohibition against waste importation is surely related to the County's goal of preserving and managing its landfill space. The plaintiff cannot, therefore, argue that the policy violates due process.

Unquestionably, the County based its rejection of the plaintiff's application for waste disposal on "the County's policy on out-of-county waste," a policy "to ban all out-of-county waste." Plaintiff's Brief, Exhibit B. As the plaintiff correctly notes, this policy provides no guidelines for importation of solid waste into the County; rather, the County, for whatever reason, has determined that importation of such waste is not a desirable activity. The County, in defense, notes first that the policy is even-handed in that it applies to other Michigan counties as well as to out-of-state entities, and second that such policy, as long as it is reflected in the County's waste disposal plan, is consistent with the MSWMA.

Review of applicable case law reveals a single circuit court opinion addressing the fundamental issue posed by the parties. In *Evergreen Waste Systems, Inc. v. Metropolitan Service District*, 820 F.2d 1482 (9th Cir.1987), the court, in evaluating a local ordinance barring importation of all waste into a metropolitan planning area's landfill, held that "'evenhandedness' requires simply that out-of-state waste be treated no differently from most [in-state] waste."[2] *Id.* at 1484, citing *Washington State Trades Council v. Spellman*, 684 F.2d 627, 631 (9th Cir.1982), cert. denied, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983). Indisputably, St. Clair County's challenged policy treats most in-state waste in the same manner as out-of-state solid waste by prohibiting the importation of either into the county. The policy is therefore subject to the balancing test developed in *Pike, supra.*

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[2] The plaintiff urges that *Evergreen* is of marginal precedential value in resolving the current dispute, in light of the district court's finding that the defendant acted as a market participant in barring importation of waste, and was therefore exempt from commerce clause coverage. *Evergreen Waste Systems, Inc. v. Metropolitan Service District*, 643 F.Supp. 127, 131 (D.Or.1986). Yet, the Ninth Circuit unquestionably affirmed the district court by finding that the ordinance regulated evenhandedly, and that its burdens on interstate commerce were not clearly excessive in relation to the putative local benefits. Nowhere in the appellate decision does the court mention the market participant doctrine.

St. Clair County's policy serves a legitimate local purpose by extending the useful lives of the County's landfills. Yet, as in *Evergreen*, the parties' positions conflict concerning whether the policy's burden on interstate commerce "is clearly excessive in relation to the putative local benefits . . . ." *Pike*, 397 U.S. at 142, 90 S.Ct. at 847. *Evergreen* found that the availability of alternative landfill sites in Oregon evidenced the "minimal burden" imposed upon interstate commerce by the challenged local ordinance. 820 F.2d at 1485. Similarly, in the present case, the plaintiff does not allege that, as a result of St. Clair County's policy, disposition of out-of-state waste in Michigan is a practical impossibility. The Court concludes, therefore, that the County's policy minimally burdens interstate commerce. Weighed against the local benefits attributable to the challenged policy, the provision of a structured plan for disposal of the County's waste, the Court finds that the policy is a valid exercise of the County's police power.

V.

Based upon the preceding, the Court DENIES the plaintiff's request for a declaratory judgment holding the 1988 amendments to the Michigan Solid Waste Management Act violative of the commerce clause of the United States Constitution, and therefore DENIES the plaintiff's request for an injunction prohibiting the amendments' enforcement; and DENIES the plaintiff's request for a declaratory judgment holding the defendant St. Clair County governmental entities' application of the Michigan Solid Waste Management Act in denying the plaintiff's permit application unconstitutional, and therefore DENIES the plaintiff's request for an injunction prohibiting future such applications of the MSWMA.

IT IS SO ORDERED.

APPENDIX C

No. 90-1361

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Filed: July 16, 1991
Leonard Green, Clerk

BILL KETTLEWELL EXCAVATING, INC., d/b/a FORT GRATIOT SANITARY LANDFILL, A MICHIGAN CORPORATION,

Plaintiff-Appellant,

v.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, ET AL.,

Defendants-Appellees

ORDER

BEFORE: NORRIS, Circuit Judge; WELLFORD, Senior Circuit Judge; and FORESTER*, United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less of a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green,
Clerk

* Hon. Karl S. Forester sitting by designation from the Eastern District of Kentucky